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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT AND INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

In pursuance of paragraph 1 of Rule 12 of the Supreme Court, the appellants, Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, herewith file with the Clerk of the Supreme Court of the United States the statement of points on which they intend to rely and of the parts of the record which they think necessary for the consideration thereof, to wit:

The jurisdiction of this case arises under the Fourteenth Amendment to the Constitution of the United States.

The appellants rely on the point that the liberty of contracting as to private business is a right protected by the

14th Amendment of the Constitution of the United States; that a statute of a state which arbitrarily denies or materially abridges this right is therefore unconstitutional and void, and, specifically, that the statute of the State of Mississippi, designated as chapter 128 of the Laws of Mississippi of 1918 (Hemingway's Code of Mississippi, 1927, Sections 2596 to 2603, inclusive), Sections 2274 to 2881, both inclusive, of the Mississippi Code of 1930, is for these reasons unconstitutional.

The particular portion of the statute to which the objection of unconstitutionality especially relates, in this case, is the 3d section, which provides that "When any contractor or subcontractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or subcontractor shall promptly make payment to all persons furnishing labor or materials under said contract," and that, though the bond omit this additional obligation, persons furnishing labor and material shall have a right of action on the bond to the same extent as if it were contained in the bond.

The point most seriously relied on arises under the 3d section of the Act, and under the construction given to that section by the Supreme Court of Mississippi in the present case. The bond which the landowner and the appellant, Hartford Accident & Indemnity Company, which is a surety company, agreed on in this case was carefully drawn to prevent its falling within the purview of the Act. Its condition was not "for the faithful performance of the contract," but to "indemnify the obligee against loss or damage directly caused by the failure of the principal to perform the contract." A condition of it was that breaches

of the contract by the obligee would avoid the bond. It provided against assignment of the funds due the contractor, and that on notice of any lien in favor of a materialman the funds due the contractor should be withheld by the obligee until the lien was discharged. It was provided that the bond was not to cover any provision of the contract "for the furnishing of any bond," and that no suit should be maintained on the bond by or for the use of any one except the obligee.

The point is relied on that the Supreme Court of Mississippi, in deciding that such a bond fell within the purview of the statute, that the provisions of the bond by which it was sought to deny to materialmen a right of action on it were ineffectual, and that the provisions which made the bond void if the underlying contract was breached could not be used in defense against the liability arising under the statute in favor of materialmen, thereby, for the purposes of appeal to this Court, enlarged the scope of the language of the Act itself, and that its constitutionality will be tested in this Court according to the effect produced by the construction of the Supreme Court of Mississippi.

The point is, therefore, relied on that the statute deprives a landowner, contracting to have work done of a purely private nature and affected with no public use or interest, and a company engaged in the surety business of the liberty of contracting for the indemnifying of the landowner against loss directly arising from breaches of the contract by the contractor except upon the condition that the surety shall unconditionally become liable for all claims of materialmen, and that, as thus construed and applied, the statute is an arbitrary and unconstitutional interference with private liberties and property rights.

The point is relied on that the statute, as construed and applied by the Supreme Court of Mississippi, cannot be upheld, as against the constitutional objection, on the ground that its enactment is within the police power of the State.

The point is relied on that the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the bill of complaint, so far as relates to grounds 3, 4, 5, 6, 7, 8, 9, and 10 of the demurrer, which attach the statute stated above for repugnancy to the United States Constitution (*a*) because of its unwarranted interference with the freedom of contract of the owner of the property, the contractor and the surety of the contractor, (*b*) because it is a legislative attempt to make a contract between persons without their consent and to give to third persons rights in a contract without the consent of the contracting parties, and thereby deprives the appellant of liberty and property without due process of law and denies it the equal protection of the law.

The Supreme Court of Mississippi ruled that nowithstanding the provisions of a private contract it was within the powers of the legislature to set aside the provisions of that contract and to make the contract, a surety bond in this case, inure to the benefit of persons not a party thereto and against whose right to sue thereon the contract has specifically provided against.

The court held that the provisions of the contract must yield to the statute and that third persons, not parties to the contract, had a right to recover thereunder because of the statute.

The appellants, in filing their præcipe for transcript, have included therein only such parts of the record as are, in the judgment of their counsel, necessary to the consideration of the points set forth above. Hence the appellant designates as necessary to the consideration of these points the entire record as transmitted to this court.

Appellants cite as sustaining the jurisdiction of this case the following cases:

Adkins v. *Children's Hospital*, 261 U. S. 525; 67 L. Ed. 785.

Appleby v. *New York*, 271 U. S. 364; 70 L. Ed. 992.

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U. S. 673; 74 L. Ed. 1107.

Cheney v. *Libby*, 134 U. S. 68; 33 L. Ed. 818.

Coolidge v. *Long*, 282 U. S. 582; 75 L. Ed. 562.

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Gibbs v. *Tally*, 133 Cal. 373; 65 Pac. 970.

Hess v. *Denham Lumber Co.* (Texas), 218 S. W. 162.

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Mallett v. *North Carolina*, 181 U. S. 589; 45 L. Ed. 1015.

Mayer v. *Nebraska*, 262 U. S. 390; 67 L. Ed, 1042.

Montague v. *Furniss*, 145 Cal. 205; 78 Pac. 640.

Near v. *Minnesota* (*ex rel.* Olson), 283 U. S. 697; 75 L. Ed. 1357.

New York Life Ins. Co. v. *Dodge*, 246 U. S. 357; 62 L. Ed. 772.

Ribnick v. *McBride*, 277 U. S. 350; 72 L. Ed. 913.

St. Louis & I. M. R. Co. v. *Starbird*, 243 U. S. 592; 61 L. Ed. 917.

Smith v. *Cahoon*, 283 U. S. 553; 75 L. Ed. 1264.

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Supreme Lodge v. *Meyer*, 265 U. S. 30; 68 L. Ed. 885.

Truax v. *Corrigan*, 257 U. S. 312; 66 L. Ed. 254.

Tyson v. *Banton*, 273 U. S. 418; 71 L. Ed. 718.

William v. *Baldwin* (*Tex.*) 228 S. W. 554.

Woolf v. *Industrial Court*, 262 U. S. 522; 67 L. Ed. 1103.

The attention of appellee is directed to paragraph 3, Rule 12, of the Supreme Court of the United States, which reads:

> "Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in rule 7, paragraph 3 (former rule 6)."

W. CALVIN WELLS,
L. BARRETT JONES,
Attorneys for Appellants, Hartford Accident & Indemnity Co. Aetna Casualty & Surety Company.

I, Gerard H. Brandon, attorney of record for appellee, N. O. Nelson Manufacturing Company, assignee, do hereby acknowledge service upon me of the copy of the foregoing jurisdictional statement, but reserve the right of the appellee to move to dismiss.

Witness my signature this the 12th day of June, 1933.

GERARD H. BRANDON,
Attorney for Appellee, N. O. Nelson Manufacturing Company, Assignee.

Address: Natchez, Mississippi.